

STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON JUDICIAL ETHICS

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QUESTIONS PRESENTED:

Does the Code of Judicial Conduct require disqualification of a judge in domestic cases in which a partner or associate of the judge's former law firm is appointed as a guardian ad litem, where the judge's affiliation with the firm ended relatively recently? If disqualification is required, may the judge ask the parties to consider a waiver under the Code?

FACTS PRESENTED:

Facts from the judge describe a fifteen year relationship with a law firm prior to assuming judicial duties approximately two and one-half years ago. Two attorneys from the firm are certified to be guardians ad litem in a jurisdiction where the judge hears cases. The judge has disqualified herself/himself from hearing any domestic cases in which either attorney acts as counsel for a party. The judge maintains social relations with both attorneys.

DISCUSSION AND APPLICATION OF CODE OF JUDICIAL CONDUCT:

Under Canon 3E(1) of the Code of Judicial Conduct (Supreme Court Rule 38, effective October 1, 2001), a judge must disqualify herself/himself in proceedings where "impartiality might reasonably be questioned" The perspective for assessing reasonable questions is that of "a disinterested person fully informed of the facts" Commentary, Canon 3E(1). Although the precise facts presented in this case are not covered explicitly in the Code, the Code makes it clear that the circumstances listed in the Code requiring disqualification are not exhaustive.

In this case, the judge had a lengthy business association with the law firm, which ended relatively recently. The committee thinks that timing is important and notes that its opinion might differ with a business relationship more distant. The committee also bases its opinion on the business nature of the relationship and does not address the social aspects.

It is significant that the judge perceives conflicts in cases in which these former colleagues represent parties, and that the judge has disqualified herself/himself in advance from hearing such cases. The committee recognizes distinctions between a lawyer's role in advocating for a client and the role of guardian ad litem in investigating facts and impartially rendering strictly advisory recommendations to the court. At the same time, a court considers seriously and often credits the guardian's views on weighty family matters such as child custody. The credibility of the guardian is important, and a prior association of the nature present here could affect the judge's assessment of credibility. The committee believes a disinterested person would question the judge's impartiality under circumstances where the judge perceives a conflict sufficient for disqualification in other cases.

The judge also requests guidance on waiver of disqualification under the Code. Under Canon 3F, if disqualification is required, the judge may "ask the parties and their lawyers . . ." to consider a waiver. The judge is entitled to assume that counsel will explain the advantages and risks of waiver to their clients. The committee notes the Canon's requirements that the parties' consideration of waiver must be "out of the presence" of the judge and that any waiver agreement must be entered in the record. Canon 3F.

ADVISORY OPINIONS ON THE QUESTIONS PRESENTED:

The Code of Judicial Conduct requires disqualification of a judge in domestic cases in which an associate or partner of the judge's former law firm is appointed guardian ad litem, under circumstances where that judge's business association with the law firm was substantial and ended relatively recently in time, and where the judge has disqualified herself/himself from hearing cases in which the former business associates appear as lawyers. The Code of Judicial Conduct permits the judge who is so disqualified to ask the parties and their lawyers to consider waiving that disqualification.

THIS ADVISORY OPINION IS ISSUED BY UNANIMOUS CONCURRENCE OF ALL COMMITTEE MEMBERS.

Reed Elizabeth Loder, Member

CAUTIONARY STATEMENT

This opinion is advisory only and not binding on the judicial conduct committee, which may, in its discretion, consider compliance with an advisory opinion by the requesting individual as a good faith effort to comply with the Code of Judicial Conduct. Rule 38-A(4)(c).